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TORTS

William E. Crawford*

Another milestone in Louisiana tort law was reached when the Louisiana Supreme Court issued its opinion in *Philippe v. Browning Arms Co.*¹ The action to recover damages for personal injuries for breach of implied warranty was implemented through article 2315, which spawns several interesting legal consequences and questions. The opinion affects the time when interest begins running on an award of damages for personal injuries recovered for breach of implied warranty. Questions about the applicability of our wrongful death and survival provisions to a recovery under redhibition are answered. Questions are raised about what rule of prescription would apply, and whether the Direct Action statute² should now apply to the insurers of defendants in a claim for personal injury damages arising from breach of implied warranty, but brought under article 2315.

Dr. Philippe, a dentist, lost his right thumb when his shotgun accidentally discharged. The trial court found that the cause of the accident was a defect in the safety mechanism of the shotgun. On defendant's appeal, the court of appeal maintained the trial court's award of damages and added \$25,000 in attorney's fees, whereupon the supreme court granted writs. An extensive opinion on original hearing found that redhibition had not been adequately pleaded, since plaintiff failed (understandably) to seek rescission of the sale of the shotgun. The court also stated that an award of typical personal injury damages was not contemplated under article 2545,³ and concluded its opinion with a finding that the plaintiff's damages for loss of future earnings should be reduced by the amount his wife could earn in the future, since she had before the accident served as his dental assistant without cash compensation. The case was remanded to the court of appeal for a determination of a proper award for loss of future earnings. Chief Justice Dixon and Justices Calogero and Dennis dissented.

On rehearing the court disavowed its earlier reasoning that plaintiff's future earnings should be reduced by the amount his wife would be able to earn, pointing out that the amount of damages sus-

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1. 395 So. 2d 310 (1980); 395 So. 2d 310 (1981) (on rehearing).

2. LA. R.S. 22:655 (1950 & Supp. 1958 & 1962).

3. LA. CIV. CODE art. 2545.

tained by plaintiff should be based solely upon the pertinent factors bearing on his personal earning capacity for the balance of his work life expectancy, without consideration of his wife's prior involvement in his dental practice. This is clearly a correct result, one which gives proper weight to the well-established principle against awarding a defendant the benefit of a windfall based upon plaintiff's particular circumstances.

The court reversed itself also on the strict pleading requirements for redhibition approved on the original hearing. Without giving in precise detail the required pleading elements, the court held that the petition adequately set forth an action under article 2545 without demanding a rescission of the sale, since to hold otherwise would represent a return to the requirement of pleading the theory of a case, which the Code of Civil Procedure specifically disavows.⁴ Finally, the court held that a *purchaser* injured by a defective product has the option of proceeding either in contract or in tort, explaining that under contract (*viz.* redhibition under article 2545), the action depends upon fault established by the breach of the duties prescribed in articles 2476 and 2545 to implement the obligation to repair damage as provided in article 2315; thus, the duty of the defendant was defined in warranty and redhibition, and defendant's recovery for the breach of that duty was implemented through the tort mechanism of article 2315. It is this new⁵ recovery structure that is the most interesting aspect of *Philippe*.

One immediate effect of making the award of personal injury damages a recovery under article 2315 is to change the point from which judicial interest begins to run, since the award is one in tort, or *ex delicto*. Interest on a judgment awarding damages in redhibition under the conventional obligation articles begins to run only from the date of judgment.⁶ Henceforth, the interest should run from judicial demand, as provided in Louisiana Revised Statutes 13:4203 for interest on judgments *ex delicto*.⁷

While no case in our jurisprudence has wrestled with the question of whether wrongful death and survival actions could be brought in a claim based upon redhibition, since the *Philippe*

4. LA. CODE CIV. P. arts. 851-892 (particularly comment (b) to art. 862).

5. It is submitted that the full recovery allowed in the instant case was within the contemplation of Civil Code article 1934(2) as interpreted by the Louisiana Supreme Court in *George v. Shreveport Cotton Oil Co.*, 114 La. 498, 38 So. 432 (1905), and *Rapids Grocery Co. v. Clopton*, 171 La. 632, 131 So. 734 (1930).

6. See *Davis v. LeBlanc*, 149 So. 2d 252 (La. App. 3d Cir. 1963).

7. LA. R.S. 13:4203 (1950) provides that "Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, 'ex delicto', which may be rendered by any of the courts."

recovery is through article 2315 the wrongful death and survival provisions of that article now apply to the action for personal injuries based on breach of implied warranty. The potential problem was obvious, since the wrongful death and survival provisions of Louisiana law are written into article 2315 and are not written into article 1934, which governs the damages recoverable for breach of contract, including the breach of implied warranty, or redhibition.

The opinion keeps intact the requirement that the redhibitory action, being one in implied warranty, is available only to a *purchaser*. No privity is required between the purchaser-plaintiff and the seller-defendant. *Media Production Consultants v. Mercedes-Benz of North America, Inc.* established this point very firmly in our modern products liability jurisprudence.⁸

The *Philippe* opinion declares that the standard of care for the manufacturer as a seller is the one arising from the warranty against hidden defects of the thing sold, as set forth in article 2476. A breach of that warranty, in the scheme of the Civil Code, is brought in redhibition under article 2520, which further defines the requisite defect in the thing sold as one "which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice." The material allegations of fact in a case such as *Philippe* brought in redhibition would therefore differ from a typical products liability case brought under the *Weber v. Fidelity & Casualty Insurance Co.*⁹ theory of fault under article 2315, because the *Weber* concept of fault, even as modified and discussed in later cases by the Louisiana Supreme Court,¹⁰ is that the thing be "defective, i.e., unreasonably dangerous to normal use." If the plaintiff is to recover attorney's fees, this distinction in pleading might well be crucial to having the court give recovery founded in implied warranty, and with it, attorney's fees, rather than making the award in *Weber*-tort and without attorney's fees.

If allowing the *Philippe* action in redhibition through article 2315 carries with it any sort of bonus in the way of attorney's fees and an earlier date for the running of interest, it might well be found also to carry its own hidden defect, in that the prescriptive period for an action in redhibition could run on a purchaser before any injury occurs from an alleged vice in the article purchased. Arti-

8. 262 La. 80, 262 So. 2d 377 (1972).

9. 259 La. 599, 250 So. 2d 754 (1971).

10. See, e.g., *DeBattista v. Argonaut-Southwest Ins. Co.*, 403 So. 2d 26 (La. 1981); *Herbert v. Brazzel*, 403 So. 2d 1242 (La. 1981).

cle 2546¹¹ provides that the action in redhibition may not be brought if a year has elapsed since the discovery of the vice. It is submitted that any allegations or testimony by the purchaser that he had trouble with the article since the very time of purchase, several years prior to his injury, for instance, would result properly in a finding that the action had prescribed; but if the action in redhibition was well-pleaded and filed properly within one year of the injury, the tort action in the *Weber-2315* sense would have been preserved under the current law on interruption of prescription.¹²

The decision does leave an obvious question about the current status of the action in redhibition for non-personal injury damages. If the action is not for personal injuries, but only for damages flowing from the performance or condition of the article itself, then it is submitted that the court should relegate that action to implementation under article 2545 and the applicable measure of damages set forth in article 1934. The court's innovative interpretation of the implied contract implemented in tort to the extent achieved by *Philippe* is salutary, but there is no corresponding public policy to be served by taking the entire redhibitory action and turning it into tort. Presumably the court will allow such an action to continue under the provisions of the Code relating to conventional obligations.¹³

The Direct Action statute has been restricted to actions in tort against liability insurance carriers.¹⁴ Presumably the insurer of a seller-manufacturer defendant in a bona fide redhibitory action for personal injury damages therefore was not covered by the statute prior to *Philippe*; but now that *Philippe* has declared such an action to be in tort, it seems clear that the statute will now apply to those insurers.

It should be further observed that economic loss or property damage within the scope of article 1934(2) should be recoverable under the *Philippe* theory, since those are traditional tort-type damages of the same general nature as personal injury damages.¹⁵

11. In this case, the action for redhibition may be commenced at any time, provided a year has not elapsed since the discovery of the vice.

This discovery is not to be presumed; it must be proved by the seller.

LA. CIV. CODE art. 2546.

12. See *Nini v. Sanford Bros., Inc.*, 276 So. 2d 262 (La. 1973); LA. CODE CIV. P. art. 862.

13. LA. CIV. CODE arts. 1930, 1934, 2476 & 2520-2548.

14. *Reeves v. Globe Indem. Co. of New York*, 182 La. 905, 162 So. 724 (1935).

15. See note 5, *supra*.